IN THE UNITED STATES COURT OF FEDERAL CLAIMS BID PROTEST

| FMS INVESTMENT CORP., et al., |) |
|-------------------------------|--------------------|
| Plaintiffs, |) |
| v. |) Case No. 18-204C |
| UNITED STATES OF AMERICA, |) Judge Wheeler |
| Defendant. |) |
| |) |

PLAINTIFFS' RESPONSE TO GOVERNMENT NOTICE DATED MARCH 19, 2018

On behalf of Plaintiffs FMS Investment Corp. ("FMS"), Account Control Technology, Inc. ("ACT"), GC Services Limited Partnership ("GC Services"), and Continental Service Group, Inc. ("ConServe") (collectively, the "Plaintiffs"), ACT files this Response to the Government's Notice dated March 19, 2018.

On March 19, 2018, the Government filed a Notice with the Court stating it is engaged in an "ongoing review of the claims alleged in the filed protests as well as of the underlying solicitation . . . to assess its options and to identify the best path forward for the agency and borrowers." ECF No. 149 at 1. The Government provided no detail regarding the course of action it plans to take, stating "[a]ll options remain on the table." *Id.* The Notice goes on to say the Government is "open to continuing with the litigation under the current or a modified schedule, or to a stay of proceedings to allow ED to finish its assessment. . . ." *Id.* at 1-2.

This matter has been ongoing, in various forms, since December 2016. Over that time, the Government intermittently has suggested it would produce relevant documents, make timely decisions, keep the Court and the parties apprised of its schedule, and correct the errors that have pervaded its several award decisions. To this day, however, those promises remain unfulfilled.

Now, on the eve of a hearing focused on the Government's failure once again to produce documents explicitly referenced in the Source Selection Decision, the Government asks this Court to take some undefined action to delay the current proceedings for some undetermined period of time so the Agency can take some unspecified corrective action. While Plaintiffs have no desire to waste further time, resources, and money fighting over an issue that could become moot if the Agency intends to take prompt and meaningful corrective action, we have been down this road before. Accordingly, Plaintiffs do not believe further delay is warranted at this point without a firm commitment from the Agency that:

- It will announce the specific terms of its proposed corrective action by a certain, specified date and those terms will be shared with the Court and the parties;
- A firm deadline will be agreed upon for the completion of the announced corrective action;
- The Agency will designate a responsible Department of Education official to be present at a near-term status hearing to ensure the corrective action stays on track and to ensure Agency accountability if it does not; and
- The current Preliminary Injunction will stay in place through the entirety of the corrective action and any subsequent protests.

Without these protections, Plaintiffs fear a delay at this time will lead to more litigation and a less efficient process in the future.

While Plaintiffs, generally speaking, are not against a stay to prevent unnecessary exertion of time and resources on this litigation, as noted above, the Government's Notice does not provide the specificity necessary to reasonably evaluate whether a stay is appropriate at this time. The Notice, filed on the eve of Friday's hearing, provides no indication regarding what the possible outcome of the Government's "assessment" might be, nor how long such an assessment might take. When it last announced corrective action in May 2017, it took approximately *eight months*

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for any decision to be made, and this decision was prompted only by an Order from this Court

requiring that the Agency complete corrective action by a certain date.

The first Complaint in this matter was filed on February 9, 2018. The Government has had

over a month to review its procurement record in the context of the Complaints that have been

filed. If indeed "All options remain on the table" as the Government states in its Notice, then the

Government has not made any progress in addressing this matter. Until the Government puts forth

a credible corrective action plan backed by leadership personnel in the Department of Education

who are committed to executing that plan on a set timeline, a stay of the litigation for an

indeterminate amount of time based on the Government's Notice will further delay the ultimate

resolution of this matter. In the absence of receiving these details from the Government, Plaintiffs

are opposed to any stay of proceedings at this time.

Respectfully submitted,

Dated: March 20, 2018

SHEPPARD MULLIN RICHTER & HAMPTON

LLP

/s/ Jonathan S. Aronie_

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on all parties electronically via the CM/ECF system on this 20th day of March 2018.

/s/ Jonathan S. Aronie
Jonathan S. Aronie